Supreme Court, U.S.
FILED

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JANICE BATES HOLMES

Petitioner,

versus

WAYNE SCOTT

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seating of one juror who has been told by the victim of the crime what happened violates due process of law and the right to a fair and impartial trial. Amends. V, VI, and XIV.

2. Whether the failure of trial counsel to challenge a juror who has been told by the victim of the crime what happened raises a presumption of prejudice requiring no inquiry as to actual performance. Amends. VI & XIV.

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The opinion of the United States Court of Appeals for the Fifth Circuit, affirming denial of the writ was not published. A copy of the unpublished opinion of December 4, 1995, is attached as Appendix.

STATEMENT OF JURISDICTION

Because Petitioner did not file a motion for rehearing in the Fifth Circuit, this petition is due on or before March 4, 1996. This Court has jurisdiction of the petition under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The controversy here involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant Janice Holmes was convicted of aggravated robbery on August 15, 1980, in the 287th District Court, Muleshoe, Bailey County, Texas, and sentenced to 60 years confinement by the jury. (R.I. 14, 15). After direct appeal and, then, state habeas action, she sought relief by way of §2254. On April 12, 1995, after evidentiary hearing, the Magistrate recommended that the writ be dismissed with prejudice. (R.I. 73). Appellant filed written objections to the recommendation. (R.I. 99). On May 30, 1995, the United States

District Court concurred with the Magistrate and dismissed the petition. (R.I. 107). A timely notice of appeal to the Fifth Circuit was filed. (R.I. 108). On June 16, 1995, a certificate of probable cause was issued. (R.I. 109).

The Fifth Circuit disposed of the appeal by summary calendar on December 4, 1995. See Appendix.

REASONS FOR GRANTING THE WRIT

A. Standard of review on ineffective assistance.

A claim that counsel's performance fell below the threshold for effective assistance is analyzed under the framework that this Court established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To carry his burden, Petitioner must show that (1) his attorney's performance was deficient and (2) this inadequate exhibition prejudiced his defense.

To satisfy the first prong, Petitioner must show that the alleged errors of his counsel were so serious as to render the assistance received below the constitutional minimum guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 686. That constitutional minimum is measured against an objective standard of reasonableness. Id. at 688.

As to the second prong, the Petitioner must demonstrate that his counsel's inferior performance so prejudiced his defense that the proceeding was

fundamentally unfair. Id. This test is the linchpin and requires a showing that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice is presumed without inquiry when the circumstances are sufficient to raise a presumption of ineffectiveness as opposed to a court "looking at actual performance."

A shorthand summary of the voir dire by the prosecution and defense is necessary to put Appellant's claim into proper perspective.

a. The prosecutor's voir dire.

The prosecutor determined by a show of hands that "practically everyone of you" (jury panel) has heard something about the case. (R. II. 15).

1. NORMAN BAYS, a first row prospective juror, had represented the co-defendant, Jimmy Jordan, a fact with which trial counsel was unaware. (R. II. 15). Mr. Bays believed his knowledge of the facts would preclude him from being a fair and impartial juror. He was excused. (R. II. 16).

2. BETTY JO DAVIS, a first row prospective juror, had visited with someone who was a witness in the case. Whatever

Ms. Davis talked with the "someone" about would likely influence her verdict. She was excused. (R. II. 17).

3. BETTY LONG HOPPER, a first row prospective juror, had a conversation with "someone" about the case which would definitely influence her verdict. She was excused. (R. II. 17, 18).

4. JAMA BROWN, a first row prospective juror, had spoken with "someone" she knew to be a witness, but it would not necessarily influence her verdict. Trial counsel for Appellant asked her no questions. (R. II. 18).

5. ANITA S. ALLGOOD, a first row prospective juror, spoke with "the lady that was injured in the robbery. She just told me what happened." Her husband was under subpoena to testify for the State. None of this would influence her verdict. (R. II. 18, 19). No questions were asked by trial counsel for Appellant.

6. HARRY WADDLE, a second row prospective juror, had talked to a unknown State's witness. He believed it would influence his verdict. (R. II. 20).

7. JESSIE GRAY, a second row prospective juror, vacillating on the simple question of whether he had spoken to someone who purportedly knew the facts of the case, grudgingly acknowledged that he had. Gray said he could be fair and not influenced by what he had heard. (R. II. 21). No questions were asked by Appellant's trial counsel.

8. LOYD ROGER ALBERTSON, a next row prospective juror, had spoken to a witness about the facts of the case. Albertson believed he could lay aside what he had heard and enter the proceedings with an open mind. No questions were asked by Appellant's trial counsel. (R. II. 22, 23).

9. HAL ANDERSON, a prospective juror, indicated he had spoken with a witness in the case and it would influence his decision making. Mike Charlton, Appellant's co-counsel at trial, challenged Anderson for cause. He was excused. (R. II. 23, 24).

Mr. Young, the prosecutor, reckoned that "the rest of you" are telling us that, although you may have heard something about the case, it was coffee shop, radio or newspaper talk. Apparently all of the remaining veniremembers believed they could resolve the case from the facts presented by witnesses under oath in the courtroom as opposed to extrinsic testimony. (R. II. 24).

Mr. Young then explained his burden of proof (R. II. 27), that jurors should not place an impossible burden on him, viz, proof beyond all possible doubt, and *honed* the distinction between proof beyond a reasonable doubt and beyond all possible doubt (R. II. 28, 29), covered the presumption of innocence (R. II. 30), touched on the defendant's constitutional right to remain silent (R. II. 30, 31), and made plain the punishment range in the case. (R. II. 31-34).

10. MARTHA BUSH, a prospective juror, was not convinced she could participate in punishing or sentencing anybody for a crime, especially to a term not to exceed 99 years or life and not less than 5 years. (R. II. 34, 35). No one challenged her for cause.

Mr. Young concluded his voir dire. (R. II. 37).

b. Appellant's voir dire.

Michael Charlton, Appellant's co-counsel at trial, began his voir dire by attempting to determine how many veniremembers knew Mr. Young, the prosecutor in the case. (R. II. 38, 39).

11. LOU ANN BLACK, a prospective juror, upon questioning from Mr. Charlton, insisted she would be able to set aside her feelings about Mr. Young, look at the evidence fairly and listen to the defense counsel with equal attention. (R. II. 39, 40).

12. DOUGLAS BALES, a prospective juror, indicated that he would be able to abolish his long standing but non-professional relationship with Mr. Young, take seriously what defense counsel might suggest and render a fair decision. (R. II. 40, 41).

13. JOHN C. RANGE, a prospective juror, did not know Mr. Young. (R. II. 42).

14. MARVIN GEORGE DAVENPORT, a prospective juror, knew Mr. Young; however, he would be able to evaluate the evidence fairly. (R. II. 42).

15. CLIFFORD BUCKNER, a prospective juror, who worked at the Goodyear Tire

Company, knew Mr. Young, but that fact was of little consequence when fairly gauging the evidence. (R. II. 42, 43).

When asked by Mr. Charlton if any veniremember would attach more significance, weight or credibility to witnesses offered by Mr. Young than those proffered by the Defense, he was met with silence, presumably indicating a collective "no." (R. II. 43, 44).

Mr. Charlton then dealt with the panel as a whole regarding the law equally applying to all citizens and objections by the lawyers. (R. II. 44, 45).

16. LOYD ROGER ALBERTSON, a prospective juror (see #8, ante), was questioned by Mr. Charlton; but no questions were asked regarding his admission of speaking to a witness about the facts of the case. (R. II. 45).

17. CARL POLLARD, a prospective juror, was questioned superficially reference considering evidence excluded by the trial judge. Pollard exclaimed he would only consider evidence admitted. (R. II. 46).

18. CHESTER EMBRY, a prospective juror, would not hold objections against any

party. (R. II. 46, 47).

19. DALE MIDDLEBROOKS and DARREL EMBRY, #18's nephew, prospective jurors, indicated that objections did not bother them. (R. II. 48).

20. ROY DAVIS, expressed that he would not be bothered by objections. (R. II. 49).

21. BETTY EUBANKS, who never had any dealings with Blacks, but thought of them like other people, and Roy Lee Farley, who disclosed that "their color don't bother me," would have no difficulty in being fair to a Black. Farley could be fair on the issue of punishment. (R. II. 49-53).

22. GLENN RAY CARTER, a farmer and veniremember, who had "just never been around them (Blacks) very much," said he "would look at the situation like it is." (R. II. 53).

23. W.T. WATSON, a farmer, and Claude H. Wileman, a retired propane company truck driver, expressed no reservations about fairly treating a Black defendant. Wileman knew some black people and, in response to a question regarding always being able to be neutral in his dealings with Blacks, exclaimed, "Oh

yeah." (R. II. 53-55).

24. J.E. MEEKS, a pastor at the First Baptist Church, a prospective juror, had some dealings with Blacks which had been good. In essence, he believed that he could be fair at guilt and in assessing the penalty. (R. II. 56-58).

Mr. Charlton then attempted to determine how many veniremembers had heard nothing about the case. (R. II. 58). It appears that only four (4) members of the 64 member panel had heard nothing about the case. (R. II. 59, 60).

Russell C. Busby, lead counsel for the defense, then began his voir dire examination of the panel. (R. II. 61). He explained the burden of proof as to each element of the offense and then *heaved at gnats and swallowed camels*, viz, if the jury believed a crime occurred but not in Bailey County, the jury would be duty bound to acquit. (R. II. 62-64).

25. ANITA S. ALLGOOD, a prospective juror, see #5, ante, indicated that, although her husband had been subpoenaed as a witness, they had not talked about the case. Mr. Busby did not know that her husband was a doctor as opposed to a police officer. (R. II. 66).

Mr. Busby, apparently speaking to Mrs.

Allgood and the rest of the panel discussed the fact that police officers should not be spontaneously clothed with more credibility or believability than an ordinary citizen because of their professional station. (R. II. 67).

Mr. busby acknowledged that the case would involve testimony from State's witnesses who were friends of the panel members. Mr. Carter responded to the following question, "Is anybody going to give her (referring to Viva Lindsey, the jewelry store owner and complainant in the indictment) testimony more credence because of your friendship with her or because of your knowledge of her?" (R. II. 68).

> 26. GLENN CARTER, a prospective juror, who failed to respond earlier to similar questions, was emphatic. He and Viva Lindsey had grown up together; "Her husband, his daddy and my daddy were friends." (R. II. 69). Mr. Busby finally challenged him for cause and the court agreed. (R. II. 70).

Mr. Busby thereupon attempted to determine how many panel members were aware of the disposition of the co-defendants' cases. (R. II. 71). The following proceeding occurred at the bench in the presence, but presumably out of the hearing of the panel, viz,

27. MARTHA ROBINSON BUSH, a prospective juror, only knew that the verdicts against Jordan and Willard had been guilty, but, after another question, agreed that she knew the penalty had been 99 years for each. (R. II. 73). [Jordan was sentenced to 90 years and Willard to 50 years, (R. I. 9)] Those facts did not influence her in this case and, as a consequence, she would be able to assess as little as 5 years confinement here. (R. II. 73).

28. JACK BATES, a prospective juror, heard at the coffee shop that Jordan and Willard each received 99 year sentences. (R. II. 74). Mr. Bates "thought" he would be able to put out of his mind that Jordan and Willard were guilty and got 99 years and be fair and impartial to Appellant. (R. II. 74, 75). Busby then asked him "how he would put that out of his mind?" The State objected and the court sustained, reasoning that to permit an explanation would penetrate the mental processes of the panel member. (R. II. 75, 76). Busby objected on the theory that the question unanswered prevented him from intelligently using his peremptory challenges. (R. II. 76). He asked no further questions.

29. LOYD ROGER ALBERTSON, a prospective juror, see #8, ante, knew from the newspaper that Jordan and Willard had each received 99 years for their role in this robbery. (R. II. 76). Albertson didn't know why this would have any bearing on him fairly deciding this case. He also could assess a 5 year sentence herein if he thought Appellant was deserving. (R. II. 77). Mr. Charlton then asked Albertson, "Can you set aside your prior knowledge of the facts in the case." The State objected and the court sustained, again reasoning that the question was intended to slice though the mental processes of the panel member. (R. II. 77, 78). Mr. Charlton objected on the theory explained in #28, above. The court then openly chastised Messrs. Busby and Charlton for double-teaming Albertson. The court believed, correctly, that one lawyer should examine panel members. (R. II. 78).

30. W.T. WATSON, a prospective juror, heard "the other two guys had been tried and sentenced." He did not know the number of years. (R. II. 78, 79). He didn't think that would impact his ability to serve on this jury and assess a punishment of 5 years, if necessary

and appropriate. (R. II. 79). Mr. Busby then wanted to know how Mr. Watson "could put aside the knowledge that [he] had of the convictions in this case?" (R. II. 79). The court would not allow the question, but gave Appellant a running objection on it. (R. II. 80).

31. CHESTER EMBRY, a prospective juror, see #18, ante, was on the panel in Jordan's and Willard's case; however, he was not selected on the petit jury, but his sister was. She told him what punishments were dealt out. (R. II. 80, 81). Mr. Busby called for a peremptory challenge for cause because Embry had sat though the voir dire on the Jordan/Willard case(?) which was denied. He then challenged because his sister was on the jury and discussed the case with him; that was denied. (R. II. 81). Mr. Embry, although he knew the punishment assessed against Jordan and Willard, the facts allegedly presented against them in the voir dire (?), would not be prejudiced or biased in this case. (R. II. 82). The verdicts in the other case would not serve as any guideline in this case. (R. II. 83).

32. DARREL RAY EMBRY, a prospective juror, see #19, *supra*, only knew that the other two guys were sentenced. He either read that or heard it at the coffee shop. This wouldn't impact his decision making process at guilt or in assessing the punishment. He would go by the evidence in this case. (R. II. 84, 85).

Mr. Busby then challenged Mrs. Bush, Chester and Darrel Embry, Roger Albertson and W.T. Watson for cause in the presence and, presumably, hearing of the remainder of the panel because of their purported knowledge of the results of the Jordan/Willard trial. (R. II. 87). The trial court, mystified, wondered if he had been asleep during the proceeding since he thought all those challenged claimed they could lay aside whatever information possessed. (R. II. 87). The trial court overruled the challenges. (R. II. 88).

Mr. Busby covered the presumption of innocence. (R. II. 88). He then asked most, if not all, members of the panel some of the most harmless, unobjectionable and superficial questions in the history of lawyerdom. (R. II. 90-114).

A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to a defendant. As the District of Columbia Court of Appeals noted, "voir dire has long been recognized

as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner." *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C.Cir.1981). For this reason the courts of appeals have repeatedly expressed "confidence in the effectiveness of a skillful, deliberate, searching and thorough voir dire to counteract the threat of pretrial publicity." *United States v. Duncan,* 598 F.2d 839, 865-66 (4CA 1979), *cert. denied,* 444 U.S. 871 (1979); *Calley v. Callaway*, 519 F.2d 184, 209 n. 45 (5CA 1975); *United States v. Capo,* 595 F.2d 1086, 1091-92 (5CA 1979); *Yount v. Patton,* 710 F.2d 956, 979 (3CA 1983); *Nelson v. State,* 832 S.W.2d 762 (Tex.App. [1st] 1992).

As *Irvin v. Dowd,* 366 U.S. 717 (1961), makes plain, a juror's subjective affirmation of impartiality is not dispositive of the question of his bias. It has always been clear that "merely going through the form of obtaining jurors' assurances of impartiality is insufficient." See *Patton v. Yount,* 467 U.S. 1025 (1984); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2CA 1963), cert. denied, 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143 (1963). Instead, the trial court must determine independently and objectively whether the jurors' assurances are credible. *United States v. Gerald,* 624 F.2d 1291, 1296-97 (5CA 1980).

Although 60 out of 64 panel members knew or heard about the case from talking to a witness,

gossip, radio or television, or the newspaper (R. II. 15, 58-60) , Busby did not ask any panel member what he or she heard and from whom. For example, he could have asked each panel member

1. When did you hear about the facts;

2. Where were you when you heard about the facts;

3. Did a witness tell you about the facts;

4. Did a non-witness tell you about the facts;

5. What did the witness or non-witness tell you about the facts;

6. What is that witness or non-witness' name;

7. How well do you know that person;

8. Did you believe what that person told you;

9. How many times did you talk to that person or persons about the facts;

10. Did any of the witnesses include Viva Lindsey or employees of her jewelry store.

After establishing what information the record already exhibited, viz, that practically

everyone in this small community knew about the case or facts or both, follow-up questions reference the credibility and good-faith of the witness and reliance thereon by the veniremember should have been asked. And, did the panel member have any reason to believe that the witness had fabricated the whole of it. If not, the veniremember would necessarily possess an objective and fixed opinion about Appellant's guilt, notwithstanding subjective assurances to the contrary. *Irvin v. Dowd, supra*, 366 U.S. at 724.

Anita S. Allgood, who sat on the petit jury, was told what happened by the lady who was injured in the robbery. (She was referring to Jo Ann Sikes, an employee of Lindsey's Jewelry Store. (R.II. 18, 19; III. 24, 61)). Mrs. Allgood's physician-husband was subpoenaed by the State; however, none of this would influence her verdict. (R. II. 18-19). Busby asked her no questions regarding what "the lady" told her; instead, he asked her whether she thought police officers inherently possessed more credibility than ordinary witnesses. (R. II. 67).

Appellant supposes had a member of a jury panel spoken to a friend who was an alibi witness for the accused, another confrere, that prospective juror would be subject to a challenge for cause from the prosecution.

Although 60 of the 64 veniremembers had heard about the case from one source or another, no one bothered to determine the "bare facts" of what each panel member had heard and from whom and whether it was believed and, if not, why. Busby failed miserably, but so did the trial judge who took at face value the subjective assurances of panel members that each could be fair and impartial notwithstanding the information possessed. *Irvin v. Dowd, supra*, 366 U.S. at 724. This is a classic example of "merely going through the blind protocol of obtaining jurors' assurances of impartiality" without having a clue of the nature of guilty facts each possessed, a form that has been rejected since, at least, 1807. *United States v. Burr*, 1 Burr's 416 (CC Va 1807).

Appellant realizes that presumption of prejudice cases usually deal with extrinsic constraints beyond counsel's control. *United States v. Geders*, 425 U.S. 80 (1976) (blanket order during overnight recess which forbade discussion between counsel and client). Few cases are decided on the basis of an error or errors by counsel that are so serious a prejudice assessment is suspended; however, see *United States v. Javor*, 724 F.2d 831 (9CA 1984) (when criminal defense lawyer sleeps through substantial portion of trial, such conduct is inherently prejudicial and no separate showing of harm or unfairness is necessary).

The real issue here is whether allowing the impaneling of a juror who was told what happened by one of the victims is "structural error", which requires no inquiry regarding harm, or "trial error", which requires an assessment of prejudice or harm. *Arizona v. Fulminate*, 499 U.S. 279 (1991).

Chapman v. California, 386 U.S. 18 (1967), delineated three constitutional errors that could not be categorized as harmless, viz, using a coerced confession against a defendant, overruled in *Arizona v. Fulminate*, supra, depriving a defendant of counsel, and trying a defendant before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). Later, in *United States v. Cronic*, supra, the Court held that, in some instances, counsel's conduct can be the functional equivalent of being deprived of counsel.

It is naive to believe that "she just told me what happened" means something other than "she told me what happened"; consequently, unless Mrs. Allgood had an undisclosed reason to disbelieve Ms. Sikes about the "facts" of what happened, she had a fixed opinion about the guilt of Appellant, notwithstanding vague assurances to the contrary. *Irvin v. Dowd*, 366 U.S. at 724.

In *Nelson v. State*, supra, the Court could not accurately evaluate the prejudicial effect from the impaneling of three questionable jurors; however, it did decide that Nelson was not provided a fair and impartial jury to decide his guilt and penalty, which

undermined confidence in the outcome. That Court concluded that one biased juror on the jury renders it partial, citing *Shaver v. State*, 280 S.W.2d 740 (Tex.Cr.App. 1955), and Art. V, §13, Texas Constitution.

As *Irvin v. Dowd*, supra, points out, the existence of a preconceived notion as to the guilt or innocence of an accused, without more, is insufficient to rebut the presumption of a prospective juror's impartiality. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Id. at 723.

Here, there is no mere notion respecting guilt. A petit juror, Mrs. Allgood, was told by the victim of the crime what happened. (R.II. 18, 19). The trial judge in this case did not examine Mrs. Allgood to determine whether she believed what Ms. Sikes told her about "what happened." A quick reading of the testimony of Ms. Sikes, the prosecution's first witness, might arguably reveal what she told Mrs. Allgood before the trial. (R.III. 5-41). Additionally, Ms. Sikes was "the lady who was injured." (R.III. 24).

If Mrs. Allgood had been on the panel in *Irvin*, she would have been challengeable for cause since she had a *conversation with a witness of the transaction*, or read reports of their testimony, or heard them testify. Id. at 725.

Because the trial lawyer failed to challenge Mrs. Allgood for cause, Appellant was denied her fundamental right of an impartial jury composed of people who were unprejudiced, disinterested and equitable.

CONCLUSION

For the foregoing reasons, it is requested that the Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

(Opinion Filed December 4, 1995)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10546
Summary Calendar

JANICE BATES HOLMES
Petitioner/Appellant

vs

WAYNE SCOTT, DIRECTOR,
TEXAS DEPT. OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent/Appellee.

Appeal from the United States District Court for
the Northern District of Texas
USDC No. 5:94-CV-147-C

Before WIENER, PARKER & DENNIS, Circuit Judges.

PER CURIAM:[1]

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled

Janice Bates Holmes appeals the district court's denial of her petition for habeas corpus. Holmes argues that her trial counsel was ineffective for failing to conduct a voir dire sufficient to uncover juror bias. She also argues that her appellate counsel was ineffective for failing to raise the issue on direct appeal.

We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm for the reasons given by magistrate judge and adopted by the district court.

AFFIRM.

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principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Supreme Court, U.S.
FILED
951486 MAR 4 1996
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JANICE BATES HOLMES

Petitioner,

versus

WAYNE SCOTT

Respondent.

SUPPLEMENTAL APPENDIX

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46 pp

APPENDIX

(Filed May 30, 1995)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CASE NO. 5:94-CV-147-C

JANICE BATES HOLMES,
Petitioner

vs

WAYNE SCOTT, Director, Texas
Dept. of Criminal Justice,
Institutional Division,
Respondent

JUDGMENT

Of equal date herewith an Order of Dismissal With Prejudice having been entered,

JUDGMENT IS ENTERED ACCORDINGLY.

IT IS, ORDERED AND DECREED this Petition for a Writ of Habeas Corpus is dismissed with prejudice and all relief sought therein is denied.

The Clerk will furnish a copy hereof to any party appearing pro se and to each attorney of record by first class mail.

DATED May 30, 1995.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION
(Filed May 30, 1995)

CASE NO. 5:94-CV-147-C

JANICE BATES HOLMES,
Petitioner

vs

WAYNE SCOTT, Director, Texas
Dept. of Criminal Justice,
Institutional Division,
Respondent

ORDER OF DISMISSAL WITH PREJUDICE

The Petitioner, Janice Bates Holmes, has filed a Petition for a Writ of Habeas Corpus, 28 U.S.C. 2254. The Petitioner is represented by retained counsel. The U.S. Magistrate Judge held an Evidentiary Hearing on November 15, 1994. The U.S. Magistrate Judge entered Findings, Conclusions and Recommendation. The Petitioner has filed Objections to such Findings, Conclusions and Recommendation. The Court has made an de novo review of the records.

It is, therefore Ordered the findings of fact, legal conclusions and recommendation of the U.S. Magistrate Judge are adopted.

It is, further Ordered this Petition for a Writ of Habeas Corpus is dismissed with prejudice and all relief sought therein is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk will furnish a copy hereof to any party appearing pro se and to each attorney of record by first class mail.

DATED May 30, 1995.

_____

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION
(Filed April 12, 1995)

CASE NO. 5:94-CV-147-C

JANICE BATES HOLMES,
Petitioner

vs

WAYNE SCOTT, Director, Texas
Dept. of Criminal Justice,
Institutional Division,
Respondent

FINDINGS, CONCLUSIONS AND RECOMMENDATION

The Petitioner, Janice Bates Holmes, has filed a Petition for a Writ of Habeas Corpus, 28 U.S.C. 2254. Holmes is represented by retained counsel in this proceeding.

On May 12, 1980, a grand jury in the 154th District Court of Bailey County, Texas, indicted Holmes in Case No. 1,170, along with Jimmy Jordan and R.C. Willard, for the first degree felony offense of aggravated robbery committed on April

28, 1980. It was also alleged a deadly weapon was used and exhibited in the commission of this offense. The deadly weapon was alleged to be a handgun.[1] The indictment alleges Holmes had previously been convicted of a felony in the 64th District Court of Hale County, Texas, in Cause No. 6095. It was alleged she was convicted of felony theft on September 13, 1974.

Willard and Jordan were jointly tried in a jury trial prior to the trial of Holmes. Holmes was

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1 The indictment alleged a prior felony conviction against Jimmy Jordan and also against R.C. Willard. Jordan has filed two Petitions for a Writ of Habeas Corpus with this Court. Those are CA-5-84-227, and CA-5-85-133. Both of them were dismissed on Jordan's Motion without prejudice. The dates of the dismissals were May 15, 1985, and July 5, 1985. Willard also has filed two Petitions for a Writ of Habeas Corpus with this Court. They were CA-5-84-184, and CA-5-91-43. They were both dismissed with prejudice after consideration on the merits. The dates of the dismissals were February 21, 1986, and July 16, 1991.

represented by retained counsel. Willard and Jordan were tried in June 1980. Both Willard and Jordan were found guilty. Jordan was sentenced by the jury to 90-years, and Willard was sentenced by the jury to 50-years.

Holmes' trial began on August 11, 1980. The Court's Charge was given to the jury for Guilt/Innocence on August 15, 1980. The jury found Holmes guilty of the offense of aggravated robbery as charged in the indictment. The Punishment Phase of the trial was completed on August 15, 1980. The jury sentenced Holmes to 60-years of imprisonment. Judgment of Conviction was entered on August 15, 1980. The sentence was entered on April 22, 1981.[2]

The Trial Court denied Holmes' request for a free transcript. The Court of Appeals for the Seventh District of Texas in Amarillo on August

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2 Neither the Judgment nor the Sentence contained an affirmative finding of the use of a deadly weapon.

29, 1983, in a mandamus action decided Holmes was not entitled to a free statement of facts. Then on October 31, 1985, the Amarillo Court of Appeals decided the case on the merits without a statement of facts. On January 13, 1988, the Texas Court of Criminal Appeals ordered Holmes be granted an out-of-time appeal, appointment of counsel, and a free statement of facts. Finally, on January 16, 1989, the Amarillo Court of Appeals affirmed her conviction. Holmes filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. It was denied on July 26, 1989.

Holmes satisfies the "in custody" requirement of 28 U.S.C. 2254(a) since there is a positive, demonstrable relationship between her conviction which is the subject of this petition and her present incarceration, ***Peyton v. Rowe,*** 391 U.S. 54, 88 S. Ct. 1549 (1968), ***Sinclair v. Blackburn,*** 599 F.2d 673, 676 (5th Cir. 1979), cert. den. 444 U.S. 1023, 100 S. Ct. 684 (1980), and ***Escobedo v. Estelle,*** 655 F.2d 613, 614 (5th

Cir. 1981).

Holmes has filed three Applications with the State for a Writ of Habeas Corpus. Those were denied without a written opinion in one sentence orders by the Texas Court of Criminal Appeals respectively on September 19, 1990, January 13, 1993, and January 26, 1994.

Holmes comes here making three claims of error. Her counsel has numbered them as 1, 1a, and 2. All are claims of ineffective assistance of counsel. Those claims are as follows;

1. That counsel's inadequate and superficial voir dire examination was deficient performance; conjointly, counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result, viz, Petitioner was not provided a fair and impartial jury to decide guilt and penalty.

1a. Petitioner's appellate counsel rendered deficient performance when he failed to raise the non-frivolous issue articulated in claim 1 on direct appeal;

conjointly, there is a reasonable probability that, but for the omission, the result of the appeal would have been different.

2. The failure of Petitioner's counsel to advise her to accept the 40 or 30 year offer in this case constituted ineffective assistance; consequently, had Petitioner known the strength of the State's case and that counsel was going to perform at the level described in Claim 1, she would have accepted the offer by the prosecution.

Respondent concedes the State Court remedies have been meaningfully exhausted. An independent examination, sua sponte, indicates the State Court remedies have been meaningfully exhausted, ***Picard v. Connor,*** 404 U.S. 270, 278, 92 S.Ct. 509 (1971), ***Rose v. Lundy,*** 455 U.S. 509, 522, 102 S.Ct. 1198 (1982), ***Anderson v. Harless,*** 459 U.S. 4, 6, 103 S.Ct. 276 (1982), ***Castille v. Peoples,*** 489 U.S. 346, 109 S.Ct. 1056 (1989), ***Brown v. Estella,*** 701 F.2d 494, 495 (5th Cir. 1983) and 28 U. S.C. 2254 (b) and (c).

An overview of the trial proceedings,

coupled with the six newspaper articles involved in the claims in this case is necessary.

Muleshoe is a small community. The Lindsey Jewelry Store is located in the main part of town. It was open and operating on April 28, 1980. Mrs. Viva Lindsey, the owner of the jewelry store, had two employees, Ethel Garlington Murray and Joann Sikes, at work. All three testified Holmes came into the store a little after 4 p.m. Murray notified Lindsey there was someone in the store who might need watching. Lindsey left her office and went to the front of the store. Mrs. Lindsey said Holmes was looking at diamonds, and Sikes was showing her the rings. Lindsey said she could hear no conversation, but it was her understanding Holmes had selected a diamond necklace. Lindsey said two Black men came in, one (Willard) had a cap on and the other (Jordan) had a tall hat. They joined Holmes at the diamond counter. Lindsey said there was a conversation about a ring Jordan wanted to trade-in. Just as they

were discussing how much money Holmes would spend for the ring, Willard pulled a gun and said it was a stick up. He ordered Mrs. Lindsey and her employees to move to the back. Sikes froze and did not do what she was told. Willard reached across the counter and struck Sikes on the neck and lower part of the head with the gun. Lindsey said as they were walking to the back of the store they were told not to attempt to touch any buttons or anything, or they would be killed. The men came to the back of the store with them and were shoving them into the office. Once they were in the office they were tied up. Lindsey said Willard was the person who first pulled a gun. After the robbers left the store Mrs. Lindsey was able to free herself, then she immediately called the police. Thus, a police alert was broadcast within minutes following the robbery.

Trooper Jim Dulin of the Texas Department of Public Safety was investigating an accident in a small community near Muleshoe. He heard the

robbery report over his car radio from his dispatcher. The dispatcher said the suspects were probably traveling in a yellow colored Buick, containing three Black subjects, two male and one female, and they were perhaps headed South on the highway where Officer Dulin was located. Dulin saw a vehicle fitting this description holding persons fitting the personal descriptions. His radar indicated its speed was 98 miles an hour. He turned on his red lights and siren. The lowest speed he had on the car, even as it passed him, was 92 miles an hour. He said he pursued them at speeds of 100 miles an hour plus. He pursued the car for about 5 miles. They pulled over to the right shoulder and stopped. Dulin exited his patrol unit and ordered the persons in the car to come out. He told them to come out of the left hand driver's door, which they did. He then ordered them to lay face down on the highway with their hands outstretched in front of them. He said a male was driving the car, with a male passenger on the right

front, and the female in the back. Officer Dulin was armed with his service revolver and was carrying a .12 gauge shotgun. Officer Dulin, to protect himself, looked inside the car and searched it. He found some diamond rings, a jewelry display board, and other items. Later it was determined those rings, display board, and miscellaneous items had been taken in the jewelry store robbery. He also found a white paper bag in the car with the name Lindsey Credit Jewelers imprinted on it. Dulin identified Holmes as the woman from the vehicle. Officer Dulin found 98 rings which were taken in the Lindsey Jewelry Store robbery. Holmes, Willard, and Jordan were taken to jail. Charges were originally by complaint. Later an indictment followed.

The genesis case setting forth the constitutionally mandated test for effective counsel is ***Strickland v. Washington,*** 466 U.S. 668, 104 S. Ct. 2052 (1984). The Court decided ***Strickland*** under the Sixth Amendment Right to a fair trial, *id.*

at 685.

The ***Strickland*** standard for ineffective assistance is two pronged. The first prong requires pleading and proof by the Petitioner indicating counsel's performance was deficient. This is the deficiency test. This requires an error so serious as to demonstrate counsel was not functioning as guaranteed by the Sixth Amendment. The Court's scrutiny of counsel's performance is to be highly deferential with no second guessing. The Court is to diligently seek to eliminate the distorting effects of hindsight. There is created a strong presumption counsel's conduct falls within the wide range of reasonably professional assistance and it is a sound trial strategy. This presumption is required to be rebutted to prevail on the deficiency prong of a claim of ineffective counsel, *id.* at 689. Representation of a defendant in a criminal prosecution is an art and not a science, *id.* at 693. The second prong of the test is for the Petitioner to plead and prove the deficient performance

prejudiced the defense. This is called the prejudice test. This requires proving the lawyer's professional deficiency deprived the defendant of a fair trial. A fair trial is one which has a reliable result, *id.* at 687.

When a Habeas Petitioner alleges counsel was ineffective it is not enough to simply set this out in a conclusory fashion, ***Ross v. Estelle***, 694 F.2d 1008, 1011, fn. 2, par. 2 (5th Cir. 1983). When one claims ineffective assistance of counsel the Petitioner must identify the specific acts and/or omissions of counsel. General statements and conclusory allegations will not suffice. The factually specific professional failure must first be pled, then proven, ***Green v. McGougan,*** 744 F.2d 1189 (5th Cir. 1984). For example, on a claim of a failure to summon witnesses the minimal pleading has to allege (1) the names of the witnesses, (2) their availability at the time of trial, and (3) what the witnesses' testimony would have been, ***U.S. v Green,*** 882 F.2d 999 (5th Cir. 1989). Petitioner

must prove counsel's awareness of the availability of such witness(es). This is the deficiency prong of the test. The expected testimony also has to demonstrate it would have affected the result and reliability of the trial, ***McFadden v. Cabana,*** 851 F.2d 784 (5th Cir. 1988), *cert. denied* 489 U.S. 1083, 109 S. Ct. 1541 (1989), ***McCoy v. Cabana,*** 794 F.2d 177 (5th Cir. 1986) and ***Alexander v. McCotter,*** 775 F.2d 595 (5th Cir. 1985). This is on the prejudice prong of the ***Strickland v. Washington,*** *supra,* test because it shows what would likely have succeeded at trial, ***Young v. Lynaugh,*** 821 F.2d 1133 (5th Cir. 1987), *cert. denied* 484 U.S. 1071, 108 S. Ct. 1040 (1988), and ***Knighton v. Maggio,*** 740 F.2d 1344 (5th Cir.), cert. denied 469 U.S. 924, 105 S. Ct. 306 (1984). To prove an ineffective counsel claim the evidence is required to sustain both the deficiency and the prejudice prongs of the test. Proof of one is not sufficient.

The U.S. Supreme Court has categorized and

identified what it denominates as "trial error" and "structural error", ***Arizona v. Fulminate***, 499 U.S. 279, 111 S. Ct. 1246, 1249 (1991). Structural errors are fundamental constitutional errors. The existence of a fundamental error, e.g., deprivation of the right to counsel, requires automatic reversal of the conviction because this type of an error infects the entire trial process. There is to be no analysis of fundamental constitutional (structural) errors under harmless-error standards. However, a trial error must be assessed in the context of the other evidence presented in order to determine the effect, if any, it had on the trial and its result, ***Brecht v. Abrahamsons,*** _____ U.S. _____, 113 S. Ct. 1710, 1717 (1993). The standard for determining habeas relief when there is a trial error is whether or not the particular error "had [a] substantial and injurious effect or influence in determining" the outcome of the trial, ***Brecht v. Abrahamsons, id.*** 113 S. Ct. at 1714 citing ***Kotteakos v. United States,*** 328 U.S. 750, 776, 66

S. Ct. 1239, 1253 (1946). The Court's ***Kotteakos*** standard applies in collateral attacks on convictions such as this Petition for a Writ of Habeas Corpus. The substantial and injurious effect or influence in determining the trial outcome has application to the prejudice prong of ineffective assistance of counsel. When the question of the trial error prejudice is analyzed, it must be determined in a collateral proceeding on the basis of the ***Kotteakos*** harmless error rule.

There are copies of six newspaper articles attached as Exhibits to the Petition. Holmes' attorney has offered a fair summary of the articles and accompanying photographs where pertinent as they appeared. Counsel's description in the Petition of the articles is as follows,

> [Exh. A] **Thursday, MAy 01, 1980, Bailey County Journal** (published at Muleshoe, Bailey County, Texas): The front page headlines reflected that SUSPECTS CAPTURED MONDAY, Lindsey Jewelry

Holdup Victim, First Daytime Robbery in Last 47 Years Here. The article showed photographs of Petitioner, Robert Charles Willard and Jimmy Jordan and recounted the robbery from witnesses and the arresting officers. Bond was set for Petitioner at $100,000.00.

[Exh. B) **Sunday, May 04, 1980, Bailey County Journal** (published at Muleshoe, Bailey County, Texas): An article on the front page indicated the **Robbery Suspects Still Jailed Here.** This particular article was an abbreviated version of the May 01 theme sans photos.

[Exh. C] **Sunday, June 01, 1980, Bailey County Journal** (published at Muleshoe, Bailey County, Texas): A front page article noted that **Hearing Held in Court Here Last Wednesday.** Petitioner's name was not mentioned.

[Exh. D] **Thursday, June 12, 1980, Bailey County Journal** (published at Muleshoe, Bailey

County, Texas): This font page article stated that **Armed Robbery Pair Go on Trial Tuesday.** Jury selection probably began on Monday, June 09, as several witnesses were called on Tuesday, June 10. This article was a cut-down replica of the **Sunday, May 04,** announcement, mentioning Willard, Jordan and Petitioner (by name).

[Exh. E] **Sunday, June 15, 1980, Bailey County Journal** (published at Muleshoe, Bailey County, Texas): This front page article stated **Jury Hands Robbers Very Stiff Sentences.** Jordan was meted out a 90 year term, while Willard was rationed out 50 years. Petitioner was mentioned twice by name and once by gender in the article.

[Exh. F] **Thursday, August 12, 1980, Bailey County Journal** (published at Muleshoe, Bailey County, Texas): The article, **Criminal Court Starts Monday,** explained that Petitioner, by name, among

others, was scheduled for trial on August 12, 1980, and listed prospective jurors to be called.

Claim 1 is in part intricately tied to the pretrial publicity. Therefore, even in light of the ineffective assistance of counsel test, it is still necessary to determine if there has perhaps been a prejudice created by the pretrial publicity.

There are numerous cases, both in the Fifth Circuit and the Supreme Court dealing with the question of whether pretrial publicity denied the defendant on trial of a fair and impartial jury. While not a complete list, the controlling decisions with regard to jury prejudice influenced by pretrial publicity are ***Irvin v. Dowd,*** 366 U.S. 717, 81 S. Ct. 1639 (1961), ***Rideau v. Louisiana***, 373 U.S. 723, 83 S. Ct. 1417 (1963), ***Estes v. Texas,*** 381 U.S. 532, 85 S. Ct. 1628 (1965), ***Sheppard v. Maxwell,*** 384 U.S. 333, 86 S. Ct. 1507 (1966), and ***Murphy v. Florida***, 421 U.S. 794, 95 S. Ct. 2031 (1975). Prejudice was presumed in ***Rideau, Estes and Sheppard*** ***Rideau*** had his filmed confession

under police interrogation broadcast on television at least three times in the community where the trial took place. Both the ***Estes*** and ***Sheppard*** trials took place with a background of provocative, denunciatory, profuse and inflammatory publicity. In addition, the courthouse in each case was simply given over to the press and a circus or carnival atmosphere was created by the presence of the press during the trial.

In ***Irving v. Dowd,*** 366 U.S. at 727, it was noted eight of the twelve jurors were of the opinion Irving was guilty. The Supreme Court found when there is this pervasive of an opinion in the thinking of the jurors, it would "be difficult" to state the jurors could exclude this preconception of guilt from their deliberations. The Court found such an influence lurks in an opinion once formed and may be so persistent it unconsciously fights detachment from the mental process of the average person.

The ***Murphy v. Florida***, 421 U.S. at 800, test is even though a prospective juror may have a

pro-conceived notion as to guilt or innocence, the venireman is qualified if he can lay aside this impression or opinion and render a verdict based solely upon the evidence presented in court. The test is not necessarily the quantum of pretrial publicity, but is ultimate affect on the venire from which a jury will be selected. The beginning of the Fifth Circuit cases is ***Mayola v. State of Ala.,*** 623 F.2d 992 (5th Cir.), *reh. and reh. en banc denied,* 628 F.2d 1356 (5th Cir. 1980), *cert. denied,* 451 U.S. 913, 101 S.Ct 1985 (1981). There are numerous citations after the ***Mayola v. State of Ala.,*** *id.*, decision. One of the latest is ***Willie v. Maggio,*** 737 F.2d 1372 (5th Cir.), *reh. and reh. en banc denied,* 742 F.2d 1453 (5th Cir.), *cert. denied,* 469 U.S. 1002, 105 S. Ct. 415 (1984). The Fifth Circuit holds to establish a constitutional error the pretrial publicity must be so inflammatory and so saturate the community as to render virtually impossible a fair trial by an impartial jury.

The recent case of ***Mu'min v. Virginia,*** 500

U.S. 415, 111 S. Ct. 1899 (1991), was decided with regard to publicity and jurors. Mu'min contended his Sixth Amendment right to an impartial jury and due process under the Fourteenth Amendment had been violated since the trial judge refused to question prospective jurors concerning the specific content of the news reports to which they had been exposed. While the trial judge did not ask the venireman the source or content of their prior knowledge, he did ask them if this information would affect their impartiality. The Supreme Court specifically noted, 500 U.S. at 415, of the twelve jurors who decided Mu'min's case, eight had at one time or another read or heard something about the case. However, no juror during voir dire indicated he had formed an opinion about the case or would be biased in any way. The Supreme Court specifically held, 500 U.S. at 425, the source of information and specific content questions were not constitutionally required. The Court again returned to the ***Murphy v. Florida,***

supra, test. The relevant test is whether or not the jurors had such fixed opinions, which would not permit them to impartially judge the guilt or innocence of the particular defendant on trial.

The voir dire technique in Texas is best described as "wide open". A Texas Trial Judge will usually go through some few in number boiler-plate and statutorily required instructions and questions, then turn the voir dire over to the lawyers representing the parties, both in civil and criminal proceedings. In Texas it is a process with few boundaries. Those boundaries are usually imposed only by objections from opposing counsel, and whatever time restraints the Court may impose. Thus, there are some unasked questions in the case at bar which could have been asked about the content and the source of a juror's information, although not constitutionally required. Therefore, arguendo, conceding trial counsel was deficient in not asking content or source questions, it still does not address the prejudice question under the

Kotteakos harmless error standards.

A review of the voir dire which took place with regard to pretrial publicity, and other sources of information, is an essential ingredient of this decision. There are selected excerpts from the voir dire which are necessary to this understanding. The voir dire in part as conducted by the prosecutor covered the problem of pretrial publicity in this small community. Those pertinent voir dire descriptions and questions by the prosecutor were as follows (all are contained in Volume I of the Statement of Facts and are designated hereafter by page number),

> [p. 6] "Now, what we are looking for in picking a jury, is a jury that is fair and impartial. You see, throughout our lives, we have always heard that every defendant that has ever been charged with a criminal charge, under our judicial system is entitled to a fair and impartial jury, a *jury that doesn't already have its mind made up and is not going to be influenced by [p. 7]*

something other than the evidence presented in the courtroom. That is a fair and impartial jury.

[p. 13] Now, I realize that this, as a case, received some notoriety herein in the county. I realize that a goodly number of you have probably heard something [p. 14] about the case. I want to talk to you a little bit about that, because, you see, the fact that you have heard something about a case that is being tried, does not necessarily disqualify you, *unless you are going to be influenced by what you heard before you got here to the courtroom.*

The theory is that a jury will decide a *case based upon the evidence presented from the witness stand,* the testimony and the evidence that is ruled upon by the Court as being competent evidence and that is admitted to you as being competent evidence, *and on those matters alone.*

So if you are going to decide the case on something that you have already heard, or something that somebody has told you, or something or another else, other than evidence you hear from the witness stand, then you are not going to be a fair and impartial juror to one side or the other. Because you might be deciding the case on evidence that would not be ruled as being competent evidence by the Court, if it were offered here.

So it becomes a necessary thing to visit with you about this. How many of you have heard something about this case, other than what you have heard herein the courtroom today? Please raise your hands. (Show of hands.)

[p. 15] That is going to be practically every one of you.

[p. 24] Mr. Young: Anyone else on that row? What about the next row? Anyone in the back?

(No Further Response).

Anybody that has heard about the case?

What I am primarily interested in - I presume, from going through this individually, that the rest of you are telling me that although you may have heard something about the case, it would just be coffee shop talk or what you might have seen in the papers or heard on the radio? If I am taking you wrong, please let me know about it.

Now, then, the rest, let me ask you, from what you have heard, would you be likely to be influenced, if you were chosen as a juror in the case, or could you decide this case solely upon the facts and evidence that you hear from the witness stand? *If there is anyone that could not decide the case on the facts and evidence presented from the witness stand, or who would be influenced by something else,* I will ask you to raise your hand? (No Response.)" (Emphasis Added)

The defense attorney likewise incorporated some questions with regard to this pretrial knowledge of the jurors when he stated and questioned as follows (all of this are contained in Volume I of the Statement of Facts, and are designated hereafter by page number),

> [p. 59] "Mr. Charlton: I would like the record to reflect there are four veniremen who have not heard [p. 60] anything, any of the facts of the case, from any source whatsoever.
>
> How many of you have heard about this case from the newspaper (Show of hands.) Virtually everyone.
>
> How many of you have heard about it from just gossip or talking around town? (Show of hands.)
>
> How many of you have heard about it from the radio or television? (Show of hands.)
>
> So, most of you, except for the four, most of you have heard

about this case?

> [p. 114] I will ask you one more time. There has been some specific problems with this case because of the publicity. A lot of you have knowledge about the case. Is there anybody else that wants to state something at [p. 115] this point in time as to any problems they may have in being a fair and impartial juror in the case? (No Response.)"

The prosecutor went over some of the questions with individual jurors. As fate would have it, the very first juror on the list was a lawyer named Norman Bays. Mr. Bays had represented Jimmy Jordan. He was excused.

The prosecutor in questioning several of the jurors uncovered four prospective jurors who were disqualified because they had a fixed opinion. Those venire persons were Davis, Hopper, Waddle, and Anderson. It was after these several individual examinations the prosecutor (p. 24, Volume I of the Statement of Facts) switched to a group question. As noted, he specifically asked if

there was anyone who would simply be influenced in arriving at their verdict by something outside the admitted evidence. They were requested to raise their hand. The record indicates there was no response, meaning no one raised their hand.

The twelve jurors selected were listed at p. 125, Volume I of the Statement of Facts. The first juror was J.E. Meeks. He was questioned about these matters, and he said he would "solely" evaluate the case on the facts. He also presumed Holmes to be innocent. He said he knew there had to be a basis for an indictment, but he could also set aside this fact. Mr. Frank Stegall and Mr. Amon O. Stancell each said he had no problems about the case. Jurors Davis, Maston, Black, Sowder, Burden, Purdy, Autry, and Middlebrooks were asked no individual questions about their prior knowledge or any publicity. Keeping in mind, when they had been challenged by the prosecutor if they were going to be affected by some outside influence and could not decide the case solely on

the evidence presented at trial, then they should raise their hand, none of them had raised their hand. Anita S. Algood indicated during voir dire her husband, who was a medical doctor, had been subpoenaed as a witness in this case. She indicated perhaps she had some knowledge of the case from talking to a witness. However, the records indicate she, like the others, did not raise her hand when she was requested to do so if she had some knowledge or opinions which would affect her deliberations.[3]

During the voir dire the venire had been carefully instructed about the burden of proof, presumption of innocence, beyond a reasonable doubt, and the right of the defendant, Holmes, not to testify. ***In Mayola v. Alabama,*** 623 F.2d at 996, the following was said,

> "One seeking to have his conviction nullified on the

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3 It should be noted her husband did not testify as a witness.

ground that he was denied a fair trial to an impartial jury due to adverse pretrial publicity ordinarily must demonstrate an actual, identifiable prejudice attributable to that publicity on the part of the members of his jury (citations omitted) . . . Barring the introduction of affidavits or testimony of jurors admitting bias, proof of such prejudice without recourse to a transcript or other detailed account of the *voir dire* of the jury venire would be virtually impossible (citations omitted)."

[p. 998] Nevertheless, although this publicity certainly was prejudicial-and may very well have been sufficiently so as to have satisfied ***Rideau*** and its gloss on this point-Mayola has failed to prove that the prejudicial newspaper coverage so saturated and tainted the Blount County populace that any subsequent proceeding in that county would have been unavoidably poisoned by it. Unlike the petitioner in ***Rideau,*** who adduced evidence that his

televised confession had been seen by tens of thousands of citizens in the Louisiana parish of 150,000 from which the jury had been drawn, as well as by three of the jurors who actually heard his case, Mayola produced no Blount County newspaper circulation figures or any other evidence of the scope of that county's exposure to the offensive News and *Post-Hearld* articles . . . . In the absence of such proof, petitioner could hardly have demonstrated the pervasiveness or saturation level of prejudicial publicity necessary to invoke the ***Rideau*** presumption.

[p. 999] To satisfy his burden even in such sensational cases, the petitioner must, therefore, demonstrate that the populace from which his jury was drawn was widely infected by a *prejudice* apart from mere familiarity with the case. Where, as here, the petitioner relies solely upon the inflammatory details and tenor of particular newspaper articles

> as the seeds of that prejudice, he must evince some indication of the ambit of the dissemination of his poisonous palaver. Without such, no measure of the taint alleged to have derived from it can be deduced, and certainly the pervasive prejudice required to trigger ***Rideau*** will not have been proved.
>
> Accordingly, due to petitioner's failure to adduce any evidence of the scope of the exposure of the Blount County population to the offensive news coverage on which he relies, we hold that he has not shown the pervasive community prejudice required to trigger the ***Rideau*** presumption. Such pervasive prejudice may not be presumed simply from the content of the articles alone."

As noted, in these quotes from ***Mayola,*** Holmes must offer something as an identifiable prejudice on the part of members of the jury attributable to the pretrial publicity. Petitioner has not identified a single juror who was committed to a finding of guilt because of their pretrial opinion.

Second, she has not shown the circulation figures of the newspaper. Holmes has only offered the statement it was published on Sundays and Thursdays. Thus, as stated in ***Mayola,*** without such proof she could hardly have demonstrated the pervasiveness or saturation level of the publicity. Finally, under ***Mayola,*** she must prove the community was infected with prejudice. Holmes has offered no evidence to support such a finding.

It is, however, conceded the question here is the failure to perform a proper voir dire. If, as already noted, this claim of deficiency is conceded, arguendo, then it is on the prejudice prong the Court must decide this case. There is nothing in this record to indicate Holmes suffered any prejudice as a result of the lack of a voir dire inquiring of each individual venire person the source of their knowledge, and the specific content of the knowledge. The question was presented to the venire panel inquiring if they would be influenced by this outside knowledge however

acquired. Four venire persons were questioned, and excused because they had a fixed opinion. The prosecutor then just went to the whole panel and asked if there was anyone in the same position who had an opinion they could not set aside and could not decide the case solely on the evidence produced in Court. No one raised their hand. A similar response was sought by defense counsel. The panel indicated various sources of information, but again no one indicated they would be affected by those outside influences. Therefore, under the ***Kotteakos*** harmless error rule under ineffective assistance of counsel, Holmes cannot sustain her claim with regard to prejudice.

Claim 1a with regard to the appeal in the State Trial Court must also fail on the same prejudice prong. Holmes alleges if her trial counsel in appealing the case had alleged ineffective assistance of counsel on voir dire the appeal would have been successful. Since there was no prejudice under the ineffective assistance of counsel test, then

there was nothing to successfully appeal in the State Court system. Thus, Holmes fails on this question of ineffective assistance of counsel on the prejudice prong. Therefore, it is not essential to determine the question of deficiency of counsel since it is already clear Holmes fails on the prejudice prong. Holmes must be successful, as previously noted, on both the deficiency and the prejudice prong to sustain a successful claim of ineffective assistance of counsel.

CLAIM NUMBER 2

Holmes alleges her trial counsel had received two plea bargain offers from the District Attorney. The first was for a 40 year recommendation, and the second was for a 30 year recommendation. Without regard to the various tests which might be applied under the cases to whether or not the failure to communicate such offer was ineffective assistance of counsel, Holmes is first required to prove by a preponderance of the evidence there was such an offer(s).

Holmes is represented in this present proceeding by retained counsel. An Evidentiary Hearing was held on November 15, 1994. Four persons testified at the Hearing. First, Holmes testified. In addition, both of her previous trial counsel from the original conviction testified. Those were Russell Busby, and his assisting counsel at the trial, Mike Charlton. The Respondent called former District Attorney and now State District Judge Jack Young as its witness. Judge Young was the prosecutor at the Holmes trial.

Holmes testified she was given both the 40 and the 30 year offer. However, her position is she turned them down because Mr. Busby assured her the case would be reversed on appeal. Mr. Charlton testified he recalled there was a plea bargain offer, and he overheard a conversation between Mr. Busby and then District Attorney Young. He also recalled he conversation between Holmes and Busby. Busby testified he had no

personal recollection of any plea bargain offer. In addition, he said his file revealed no plea bargain offer.

Former District Attorney Young testified he served for over 20 years as the District Attorney in Muleshoe. In that period of time, according to his testimony, he never made, nor had a single plea bargain agreement honored by the State Judge. Judge Young testified the reason for this was because the presiding District Judge, the Honorable Pat Boone, during all those 20 years would not accept a plea bargain offer or a recommendation from the District Attorney with regard to punishment. Therefore, he said it was his policy to advise defense counsel if they wanted to plead guilty then they were on the mercy of the Court, since he could enter into no plea bargain and would make no recommendation to the Trial Judge. Judge Young recited there was only one instance in his memory where he and a defense counsel, after a trial, had worked out an agreement as to the

punishment. Judge Young said Judge Boone unequivocally rejected this offer and refused to accept the plea bargain punishment.

For Holmes to have any standing to present the merits of this claim to the Court she is required first to prove there was a plea bargain offer. I would recommend it be found Holmes has not carried her burden of proof, and there has been no proof of a plea bargain offer. I would recommend the testimony of former District Attorney and now State District Judge Jack Young be found to be credible wherein he states he made no plea bargain offers in the Holmes case. His testimony is further bolstered by Russell Busby, who had no notes of a plea bargain offer in his file, and no independent recollection of any plea bargain offer. Thus, there being no supportable factual basis for any ineffective assistance of counsel, then on claim 2 there is no sustainable ground of error.

I, therefore, recommend this Petition for a Writ of Habeas Corpus be dismissed with

prejudice, and all relief sought therein be denied.

The Clerk is directed to file the Findings, Conclusions and Recommendation and to send a copy of it to the Petitioner by certified mail/return receipt requested, and a copy to each Attorney of record by first class mail. Any party may object to the proposed Findings, Conclusions and Recommendation within ten (10) days after having been served with a copy hereof, Rule 8 (b)(3), Rules Governing Section 2254 cases, Rule 72, Federal Rules of Civil Procedure, and Rule 4 (a)(1) of Miscellaneous Order No. 6 as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas. Such party shall file with the Clerk of the Court, serve on the Magistrate Judge and on all parties, written objections, which shall specifically identify the portions of the Findings, Conclusions or Recommendation, to which objection is made and shall set out fully the basis for each such objection. Objections are required to obtain a de novo review

by a United States District Judge. Failure to timely file written objections to the proposed Findings, Conclusions and Recommendation shall bar an aggrieved party from attacking the factual findings on appeal. See ***Thomas v. Arn,*** 474 U.S. 140, 106 S. Ct. 466 (1985) and ***Nettles v. Wainwright,*** 677 F.2d 404, 408 (5th Cir. 1982) *(en banc).*

DATED April 12, 1995.

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J.Q. WARNICK, JR.
UNITED STATES MAGISTRATE JUDGE